

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR-RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE**

**SAZERAC DISTILLERS, LLC d/b/a
BARTON BRANDS OF CALIFORNIA, INC.**

and

Case 21–CA–162489

**FOOD, INDUSTRIAL & BEVERAGE
WAREHOUSE, DRIVERS AND CLERICAL
EMPLOYEES, LOCAL 630, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

Cecelia Valentine, Esq., for the General Counsel.
Ernest R. Malone, Jr., Esq. (The Kullman Firm),
for the Respondent.
Renee Sanchez, Esq. (Wohlner, Kaplon, Cutler, Halford
& Rosenfeld), for the Charging Party.

DECISION

Statement of the Case

ARIEL L. SOTOLONGO, Administrative Law Judge. On April 12, 2016, the Regional Director for Region 21 of the Board issued an amended complaint alleging that Sazerac Distillers, LLC d/b/a Barton Brands of California, Inc. (Respondent) had violated Section 8(a) (1) of the Act by denying employee Javier Sanchez’ request for union representation during a disciplinary meeting, pursuant to the well-established doctrine approved by the Supreme Court in *NLRB v. J. Weingarten, Inc.*¹ Thereafter, Respondent filed a timely answer, denying the substantive allegations of the complaint. I presided over this case in Los Angeles, California, on May 9, 2016.

Findings of Fact

I. Jurisdiction and Labor Organization Status

Respondents admits, and I find, that all material times it has been a limited liability company with an office and place of business in Carson, California, where it has been engaged in the business of distilling and bottling distilled spirits. In conducting its business operations

¹ 420 U.S. 251 (1975).

during the 12-month period ending on September 30, 2015, Respondent purchased and received at its Carson facility goods and services valued in Excess of \$50,000 directly from points outside the State of California. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent also admits, and I find that at all material times, Food, Industrial & Beverage Warehouse, Drivers and Clerical Employees Local 630, International Brotherhood of Teamsters (Union or Charging Party) has been a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practice(s)

A. Backgrounds Facts²

As briefly described above, Respondent processes and distills alcohol into spirits and other beverages, and the alcohol is delivered or loaded in tanker trucks at the facility. The events that are the subject of the complaint took place in July, 2015.³ At the time, Erik Batcke was Respondent's processing supervisor. His immediate supervisor was Jose Quinto, the assistant plant manager. Also during this time period, Javier Sanchez was an employee of Respondent working in the processing department, and his immediate supervisor was Batcke. Respondent and the Union are parties to a collective-bargaining agreement covering the employees of a certain bargaining unit, including Sanchez.

The Union had two shop stewards at the facility, chief shop steward, Raquel Avila, who worked in the shipping department, and shop steward Miguel Ramirez, who worked in the processing department, the same department as Sanchez and Batcke. These backgrounds facts are not in dispute.

² The General Counsel has made an unopposed motion to correct the transcript, which I grant, in the following manner:

Page No.	Line No.	Current Incorrect transcription	Transcript should instead read
15	16	we're	were
22	14	that respond	were assigned
24	17	that he	if you
29	5	something	smoking
54	17	August 15th	August 13th
63	21	extracting	its drafting
65	18	yourself among	your testimony with
78	20	distinguish	extinguish
90	4	we're	we've
94	13	her	him
94	17	policy according	problem stipulating

³ All dates hereinafter shall be in calendar year 2015, unless otherwise indicated.

It is also undisputed that on July 28, about 1:30 in the afternoon, Sanchez took a break in an outside (yard) area of the facility, near where some tanker trucks were parked, during which he smoked a cigarette. Likewise, it is undisputed that Batcke observed Sanchez smoking in this area, and that Sanchez saw Batcke observing him. With this background, I will discuss the testimony about the events that followed.

B. The Events on July 28

Sanchez testified that on July 28, about 1:45 p.m., Batcke approached him in the “tank room” where he was working and said, “I hate to do this but grab your personal belongings and follow” (him) to the conference room, which was by the front office on the other side of the facility from the processing department. According to Sanchez, Batcke did not tell him what this was about, and did not say anything else while they made their way to the conference room. Sanchez testified that when they arrived at the conference room, Batcke said that if he wanted to call a shop steward, to do so now. Sanchez asked Batcke to call “her” (meaning Avila, the chief shop steward), for him. Batcke then left the room, and came back a few minutes later with Quinto, the assistant plant manager, who walked in right behind Batcke. According to Sanchez, Batcke (or Quinto) said that Avila “was busy” and hence could not come.⁴ Batcke asked Sanchez, in Quinto’s presence, why he thought it was OK to smoke during company time. Sanchez replied that he was on break at the time. Batcke then asked Sanchez why he had been smoking next to the tanker truck, to which Sanchez replied that he was far away from the truck and that the truck was not connected at the time.⁵ Batcke replied that this was “outside of his comfort zone.” According to Sanchez, Quinto then informed him that he was suspended until further notice, and testified that Batcke then walked him out of the facility. (Tr. 17–25; 26–30.)

In response to specific questions by the General Counsel about this, Sanchez testified that at no time during this meeting neither Batcke nor Quinto offered to postpone the meeting until a steward could be present, or offered to get shop steward Ramirez (instead of Avila), or asked him if he still wanted to proceed with the meeting without a shop steward. (Tr. 24.) During cross-examination, Sanchez initially admitted that during their meeting Batcke had said that he had observed him smoking (Tr. 37), then denied that Batcke had done so (Tr. 40), only to concede that he had stated in his Board affidavit that indeed Batcke had said he had seen him (Tr. 40). Additionally, asked if he had filed a grievance to protest the fact that he had been denied union representation during the July 28 meeting, Sanchez testified that he had indeed filed such a grievance (Tr. 41). Respondent introduced the grievance in question into the record, filed on July 30, 2 days after the meeting. The grievance, written by Sanchez himself, simply says that “the discipline is inconsistent of (sic) the offense,” and requests, as a remedy, to be made whole under the collective-bargaining agreement. The grievance says nothing about being denied the right to a shop steward. (R. Exh. 1). It is also noteworthy that Sanchez testified that he spoke by phone with Avila on July 28, after his meeting with Batcke and Quinto, and that Avila had

⁴ I note that initially Sanchez testified that it was Quinto who informed him, upon arriving at the conference room, that Avila was busy and could not come (Tr. 19), but later changed his testimony to state that it was Batcke who had so informed him. (Tr. 23; 28–29).

⁵ By his testimony that the truck was not “connected” at the time, Sanchez was apparently alluding to the fact that no hoses were attached to the tanker truck to load or unload the alcohol cargo.

confirmed that she had been called to come to the meeting but did not come because she was “busy” (Tr. 61). Avila did not testify.

Quinto testified that he worked for Respondent from 1999 until January 2016, when he left to work for another employer. According to Quinto, in the early afternoon of July 28 Batcke came into his office to inform him that he had “caught” Sanchez smoking in a nonsmoking area where highly flammable alcohol is unloaded. Quinto instructed Batcke to bring Sanchez to the front office, so that he (Quinto) could “verify” the incident. Batcke brought Sanchez into the conference room, and then went to get Quinto, who then followed Batcke into the conference room. Once in the conference room, Quinto testified, Batcke stated that he had caught Sanchez smoking in a no-smoking area. Quinto asked Sanchez “is that true?” and Sanchez replied that he had been on break at the time, and did not deny smoking in the area. Quinto then suspended Sanchez. Quinto testified that Sanchez never asked for union representation, nor that he was ever denied union representation. (Tr. 67–71.)⁶

Batcke testified that as processing supervisor, he was Sanchez’ immediate supervisor during the events in question. On July 28, around 1:30-1:40 p.m., Batcke testified, he saw Sanchez smoking in a hazardous material unloading zone. He phoned Quinto to report what he had observed, and Quinto directed him to bring Sanchez to the front office.⁷ He then went to get Sanchez, telling him that he needed to come to the conference room. According to Batcke, he and Sanchez did not talk on their way to the conference room. When they arrived there, Batcke told Sanchez to wait there, while he went to get Quinto. According to Batcke, he did not say anything else to Sanchez before he left to get Quinto, and specifically did not say anything to Sanchez about union representation.⁸ He then left to get Quinto, and they returned together a few minutes later. Batcke then proceeded to tell Quinto, in Sanchez’ presence, that he had seen Sanchez smoking in a hazardous area. Quinto asked Sanchez if this was true. There was some discussion as to whether Sanchez had actually been on break, and Sanchez pointed out he had taken a late break. Sanchez did not deny smoking in the area, but stated that he did not know he could not smoke in that area. Batcke informed Quinto that in his opinion Sanchez’ conduct had been unsafe and unacceptable, and opined that he should not return to work that day. Quinto then suspended Sanchez. Batcke denied accompanying Sanchez out—indeed, he testified he left the conference room before Sanchez did. (Tr. 77–85; 87–90.) Thereafter, in August, Sanchez was discharged for the conduct described above, but such discharge is not alleged in the complaint.

In light of the above, the outcome of this dispute turns solely on whose testimony I credit, because the testimony of Sanchez directly conflicts with that of Quinto and Batcke as to whether

⁶ Quinto was never asked if he Batcke had said to Sanchez, while they were all in the conference room, that chief shop steward Avila was busy—as Sanchez had testified.

⁷ I note that this differs from Quinto’s version, who testified that Batcke had come into his office to report what he had seen. I do not find this variance to be significant.

⁸ After counsel had examined and cross-examined Batcke, I specifically asked him if he had said anything to Sanchez—while in the conference room before he went to get Quinto—about getting a shop steward. Batcke was equivocal, stating that he did not believe he had, or at least could not remember doing so, although he “may have.” Nonetheless, he was certain that he had not said anything to Sanchez while they were alone in the conference room before he left to get Quinto. He also added that he never contacted, or attempted to contact, Avila that day. (Tr. 88–90.)

Sanchez asked for, and was denied, union representation. For the reasons discussed below, I find that Sanchez was not offered, nor requested, union representation during the July 28 meeting.

Discussion and Analysis

It is well established that in order to be entitled to union representation under *Weingarten*, supra, two criteria must be met: First, the interview in question must be an investigatory interview which the employee reasonable believes could result in discipline. Second, the employee must request union representation. *Lennox Industries*, 244 NLRB 607 (1979); *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979); *Kohl's Food Co.*, 249 NLRB 75 (1980). The General Counsel avers that both criteria were met in this instance; Respondent avers that neither was.

With regard to the first criteria, whether the July 28 meeting at the conference room was an “investigatory” meeting that Sanchez could reasonably believe could lead to discipline, I conclude that it clearly was. In this regard, I note that even crediting Batcke’s and Quinto’s version of events, it is evident that no decision to discipline Sanchez had yet been made when they arrived in the conference room. They both testified that after Batcke informed Quinto that he had observed Sanchez smoking in a hazardous area, Quinto asked Sanchez if were true, allowing Sanchez to give his version of events—and allowing him, even if true, to provide mitigating facts. Indeed, it was after Sanchez was provided with this opportunity to explain his conduct, that Batcke then voiced his recommendation that Sanchez be sent home—a recommendation that Quinto accepted and expanded upon. Thus, the disciplinary action was not decided upon until after Sanchez had been interrogated and provided an opportunity to explain, and after his immediate supervisor provided his recommendation. Moreover, the circumstances clearly would have caused any reasonable employee in Sanchez’ shoes to fear possible discipline. In this regard I note the interview was conducted in the conference room in the front office, an area away from the production area where Sanchez works, by two supervisors, one the assistant plant manager. Finally, I note that Sanchez testified that he had seen Batcke watching him in the yard while he was smoking, and that Batcke testified that Sanchez had indeed seen him watching at the time. Thus, in these circumstances, by the time Sanchez arrived in the conference room, and certainly by the time Batcke and Quinto arrived there for the start of the meeting, fear of discipline was reasonable. Accordingly, I conclude that the July 28 meeting was an investigatory interview that Sanchez reasonably may have feared could lead to discipline.

The second requirement in *Weingarten* cases—that the employee involved in the investigatory meeting request union representation—is thus the lynchpin in this case, and a more problematic issue, fully dependent on whose testimony I credit. I note in this regard, that Sanchez testified that he did not initially ask for representation, but rather that Batcke offered it to him, telling him when they arrived at the conference room that if he wanted representation, this was the time to get it. Sanchez then asked Batcke to contact Avila, the chief shop steward. According to Sanchez, when Batcke arrived in the conference room a few minutes later with Quinto, he informed Sanchez that Avila “was busy,” and proceeded with the interview. Sanchez also testified that later that day he contacted Avila, who confirmed that she had been called and also confirming that she had not come because she had been “busy.” Batcke, on his part, denied that he had advised Sanchez to get union representation, or that Sanchez had asked him to

contact Avila, although he was somewhat equivocal in his denial. He firmly denied, however, speaking to Sanchez when they were both alone in the conference room during the brief moment before he went to get Quinto. Both Batcke and Quinto firmly denied any discussion about union representation after they both arrived together at the conference room and proceeded with the meeting.

The General Counsel argues that the issue turns only on what Sanchez, Batcke and Quinto said to each other, and nothing more, and that I should credit Sanchez' testimony that he was offered—and requested—union representation. In these circumstances, however, the testimony of Avila—the chief shop steward who Sanchez testified acknowledged to him that she had indeed been contacted to come to the meeting—was not only crucial, but indispensable. Had she been called to testify, and confirmed that Batcke (or Quinto) had asked her to come to the meeting, her testimony would have corroborated Sanchez' testimony and confirmed that he had requested union representation, as alleged by the General Counsel and Charging Party. Given Sanchez' testimony, Avila's silence is deafening. Accordingly, I must make an adverse inference that had she testified, she would not have corroborated Sanchez' testimony. This adverse inference, I conclude, is supported by several factors. First, as a union representative, Avila would have been expected to testify favorably to the Charging Party's (and General Counsel's) case—if such testimony were true. Secondly, I am highly skeptical that a shop steward, let alone a *chief* shop steward as Avila was, having been requested to represent an employee in a *Weingarten* meeting would have simply responded that she was too “busy,” and left it at that. This type of conduct by a steward could be seen as callous and irresponsible at best, and arguably amount to a violation of the steward's fiduciary duty as union representative, and I am not inclined to conclude that this is what occurred. This is especially true since there was another steward in the plant—Ramirez, who worked in Sanchez' department—who could potentially have attended the meeting in Avila's stead.⁹ I find it highly implausible that Avila would not have at least suggested that Ramirez attend, or failing that, at least not asked for a short delay in the meeting to advise Sanchez about his options. In short, I find that the scenario painted by Sanchez is unlikely to have occurred, and that the reason Avila did not testify is that she would not have corroborated him. Finally, I note that Sanchez' failure to mention anything regarding Respondent's refusal to allow him union representation in the grievance he drafted and filed a couple of days after the incident suggests that this never occurred, which would again explain Avila's silence regarding these events.

In these circumstances, and in light of this adverse inference, I cannot credit Sanchez' testimony that he was advised by Batcke to get union representation, or that he asked Batcke to contact Avila in response. Conversely, I credit Batcke's and Quinto's testimony that the subject union representation was never brought up by Sanchez or anyone else during the course of the July 28 meeting. Accordingly, since Sanchez never asked for union representation for or during the July 28 meeting, his *Weingarten* rights were not violated, as alleged in the complaint.

⁹ There is no evidence that Ramirez was unavailable to represent Sanchez at this meeting.

Conclusions of Law

1. The Respondent, Sazerac Distillers, LLC d/b/a Barton Brands of California, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Food, Industrial & Beverage Warehouse, Drivers and Clerical Employees Local 630, International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and based on the entire record in this case, I issue the following recommended¹⁰

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. July 13, 2016



Ariel L. Sotolongo
Administrative Law Judge

¹⁰ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes